SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 205

WESTERN MARYLAND RAILWAY COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

STATEMENT AS TO JURISDICTION

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IN THE COURT OF APPEALS OF MARYLAND

WESTERN MARYLAND RAILWAY COMPANY,

Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND

Appellees

JURISDICTIONAL STATEMENT

Statutory Provisions Governing Jurisdiction of the Supreme Court of the United States

A statute of the State of Maryland (quoted in full below) levies a franchise tax measured by gross receipts upon various businesses including railroads. Appellant in all of the proceedings below challenged the authority of the State administrative officials to include gross receipts from transportation and handling of imports and exports in the measure of the tax, on the ground that as thus applied the statute imposed a tax on imports and exports forbidden by Article I, Section 10, Clause 2 of the Constitution of the United States. The Court of Appeals of Maryland, which is the highest Court of the State, (two of six Judges dissenting) rejected Appellant's contention and held that the State statute as so applied was valid and was not unconstitutional.

Jurisdiction to entertain this appeal is, therefore, conferred by United States Code, Title 28, Section 1257 which empowers the Supreme Court of the United States to review final decrees of the highest Courts of the States:

> "(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The Maryland Statute Which Is Involved

The Maryland gross receipts tax which is challenged by Appellant in this case is imposed by Section 95 of the Annotated Code of Maryland (1939 Edition) and reads as follows:

> "(a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:
>
> (1) All domestic or foreign railroads companies, whose roads are worked by steam, doing business in this State, at the following rates, to wit:
>
> One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile and
>
> Two per centum on all gross earnings above $1,000 and up to $2,000 per mile, and
>
> Two and one-half per centum on all earnings in excess of $2,000 per mile.
>
> (2) Every domestic or foreign telegraph or cable, express or transportation, parlor car, sleeping car, safe deposit and trust company doing business in this State, at the rate of two and one-half per centum (2½%); provided, however, that the gross receipts tax payable in the year 1932 and in subsequent years,

by safe deposit and/or trust companies shall be computed and paid at the rate of two and one-half per centum (2½%) with respect only to their safe deposit and trust business, including all receipts derived from the business of acting in a fiduciary or representative capacity, and at the rate of two per centum (2%) on all receipts derived from the business of insurance or guaranty (if any), without any deductions or credits of any kind whatsoever.

(3) All domestic and foreign telephone and oil pipe line companies and title insurance companies doing business in this State at the rate of two per centum (2%); provided, however, that the gross receipts tax payable in the year 1932 and in subsequent years by title insurance companies shall be computed and paid at the rate of two per centum (2%) with respect only to their receipts derived from the business of insurance or guaranty, without any deductions or credits of any kind whatsoever.

(4) All domestic and foreign electric light or power companies doing business in this State, at the rate of one (1%) per centum.

(5) All domestic and foreign gas companies doing business in this State, at the rate of one and one-half (1½%) per centum.

(b) If any such railroad company has part of its road in this State and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, tele-

phone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

(c) Every partnership or individual engaged in any of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

The Court of Appeals in the present case said, "This Court in a long line of cases has sustained the statutory declaration, *supra*, that the tax here in question is a franchise tax in lieu of all other State property taxes" (see Opinion of Court of Appeals in this case printed as an appendix to the Statement as to Jurisdiction in *Canton R. R. Co.* v. *Rogan*, No. 96, October Term, 1950).

This Appeal Has Been Taken Within Proper Time Limits

The final decree of the Court of Appeals of Maryland in this case was entered on April 19, 1950, and under the rules of that Court constitutes the concluding entry following the opinion reading "Decree affirmed with costs."

On May 19, 1950 the time expired within which a motion for reargument could have been filed. No such motion was filed on or prior to that date, and accordingly the Court of Appeals on May 19, 1950 issued its mandate to the Circuit Court No. 2 of Baltimore City affirming its decision.

The appeal to the Supreme Court of the United States was allowed in response to a petition addressed to the

Chief Judge of the Court of Appeals of Maryland in an order dated July 10, 1950, which is included in this record. United States Code Title 28, Section 2101 (c) provides a period of ninety (90) days after the entry of a decree appealed from within which an appeal may be taken.

The Nature of the Case

Western Maryland Railway Company is an interstate common carrier by railroad conducting all the usual business of a Class I railroad company. By reason of the fact that it serves the port City of Baltimore, Maryland and maintains extensive piers on the harbor there, it transports to and from the port a substantial volume of export and import freight traffic.

Each year as required by the statutes of the State of Maryland it reports to the State Tax Commission its gross receipts from the transportation of freight and passengers for the preceding calendar year. Pursuing the statutory directions already quoted, the State Tax Commission apportions these gross receipts to the State of Maryland by the use of a percentage figure representing the relation of the all-track miles of the Western Maryland in the State of Maryland to its system all-track mileage. The gross receipts so apportioned become the measure of the tax which is then levied at the rates provided for in the statute.

In the years 1946 and 1947 the Western Maryland made its usual report of gross receipts earned in the calendar years 1945 and 1946 as the basis for determination of the franchise tax measured by these gross receipts for the years in which the returns were made. Subsequently, after consideration of certain decisions of the United States Supreme Court, the Western Maryland filed amended returns for these years in which the gross receipts earned in 1945

and 1946 from the transportation of imports and exports were eliminated from the gross receipts reported for use in measuring the tax. The exclusion of these gross receipts was based on the ground that Article I, Section 10, Clause 2 of the Constitution of the United States (the Import-Export Clause) as construed by the Supreme Court prohibited their use as the measure of the franchise tax.

The State Tax Commission obtained an opinion from the Attorney General of the State of Maryland, in which after a lengthy review of the authorities the Western Maryland's contention was rejected on the ground that the Supreme Court had not indicated "with certainty" that the contention was valid. 32 Op. Md. Atty. General 476. Thereafter, a hearing was held before the State Tax Commission at which the Western Maryland introduced detailed evidence with respect to the volume and character of its import and export traffic and identified the amount of its gross revenues earned in this manner. No witnesses appeared for the State and the testimony of the Western Maryland's witnesses were neither challenged, nor in any other manner contradicted. The Commission adhered to the opinion expressed by the Attorney General and declined to permit the Western Maryland to exclude from the measure of its gross receipts tax, the gross receipts earned from the transportation and handling of imports and exports. A final assessment of the tax including the gross receipts from imports and exports was subsequently made against the Western Maryland.

Because the Maryland statutes (Article 81, Section 196 of the Annotated Code of Maryland, 1939 Edition) provide that appeals from the State Tax Commission shall not operate to stay or affect the collection of taxes and that upon final decree any unpaid taxes may be refunded, the Western Maryland paid the gross receipts tax in full with

appropriate reservations of its right to refund should it ultimately prevail in this litigation. If the Supreme Court on this appeal decides that the Western Maryland's position is correct, it will be entitled to a refund of $26,024.00 of its 1946 tax payment and $51,432.47 of its 1947 taxes, and of like substantial amounts for the succeeding years.

An appeal from the decision of the State Tax Commission was pursued as permitted by the State statutes (Article 81, Section 194(b) of the Annotated Code of Maryland, 1939 Edition) to the Circuit Court No. 2 of Baltimore City where the Western Maryland renewed its charge that the inclusion of its gross receipts from the transportation and handling of imports and exports in the measure of the franchise tax was an unconstitutional application of the statute. After a hearing before the court on the record as made before the State Tax Commission, the Court wrote an opinion and signed an order in each case sustaining the action of the State Tax Commission and holding specifically, after a review of the decisions of the Supreme Court, that "it appears to me that the Maryland tax is not on the business of importing or exporting and is so remote insofar as its effects on exports and imports or the process of exporting or importing as not to be in contravention of the constitutional clause already mentioned."

The Western Maryland pursued an appeal from this decision to the Court of Appeals of Maryland, the highest Court of the State, where it renewed its contention that the inclusion of gross receipts from the transportation and handling of imports and exports within the measure of the gross receipts tax was a violation of the Import-Export Clause of the Constitution of the United States. As already indicated, the Court of Appeals (two of six Judges dissenting) wrote an opinion and entered an order holding in substance that the Import-Export Clause is no more pro-

hibitive in effect than the Commerce Clause and that "we see no reason why a franchise tax measured by gross receipts including receipts from foreign commerce should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes."

The Federal Question Involved Is Substantial

1. The Court of Appeals of Maryland has construed Article I, Section 10, Clause 2 of the Constitution of the United States (the Import-Export Clause) to be no more prohibitive on State taxation than Article I, Section 8, Clause 3 (Commerce Clause), apparently reasoning that since the franchise tax imposed by the gross receipts tax law (Article 81, Section 95 of the Annotated Code of Maryland, 1939 Edition) is in lieu of property taxes which it assumed the State might validly impose, it is within the power of the State notwithstanding the express prohibition of the Import-Export Clause.

This is directly contrary to *Richfield Oil Corp* v. *State Board of Equalization*, 329 U. S. 69 (1946), because there the Supreme Court expressly declared that the reasoning by which State taxes may be held valid under the Commerce Clause cannot be written into the Import-Export Clause as qualifications upon it because the latter clause contains an express prohibition against "any" State taxation, excepting only that necesary for execution of inspection laws. The Court said, "the fact of a single exception suggests that no other qualification of the absolute prohibition was intended." (329 U. S. 69, 76). In that case, the State of California sought to sustain its franchise tax measured by the gross receipts from retail sales, through use of reasoning under the Commerce Clause by which State taxes which do not discriminate against interstate commerce have been sustained. In the present case, the

Court of Appeals of Maryland has used Commerce Clause reasoning relating to "in lieu" property taxes, and ignored the express prohibition of the Import-Export Clause. In so doing, it has not only incorrectly construed the Import-Expert Clause by failing to give due force and appropriate meaning to every word in that clause, as the Supreme Court has said is a necessary canon of constitutional construction (*Holmes* v. *Jennison*, 14 Peters 540, 570-571), but it has decided the case in a manner which was not open to the Court to do, in the light of the *Richfield Oil Corp.* v. *State Board of Equalization* case, *supra*.

In *Cook* v. *Pennsylvania*, 97 U. S. 566 (1878) and *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917), Pennsylvania license taxes measured by gross receipts were held invalid under the Import-Export Clause to the extent that the gross proceeds of foreign commerce were included within the measure of the taxes.

The incorrect construction of the Constitution of the United States by the Court of Appeals of Maryland results in additional taxes improperly exacted from Western Maryland amounting to more than $75,000.00 for the two years here on appeal, alone. It is submitted, therefore, that the Federal question involved is substantial.

2. This appeal involves only the gross receipts taxes as imposed by the statutes of the State of Maryland. However, gross receipts taxes of one type or other are in force in a great many of the States of the United States. And in a number of them it appears likely that the same question presented by this appeal is or could be involved. See for example, *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), relating to the New York City franchise tax measured by gross receipts. A decision in the present appeal will furnish a guide which does not now exist for the proper construction of such statutes. In this connection,

the Attorney General of Maryland advised the State Tax Commission of Maryland that

> "until the Supreme Court indicates with certainty that the Import-Export Clause prohibits a State to include in the admeasurement of a franchise tax measured by gross receipts, revenues from the transportation of goods in the process of importation or exportation, it is our duty to advise you that the Maryland tax as presently assessed is constitutional." (32 Ops. 476, 484).

On the other hand, the Attorney General of the United States construed the Export Clause of the Constitution (Article I, Section 9, Clause 5) as prohibiting a Federal Transportation Tax on the receipts of railroads from the transportation of exported commodities. 31 Ops. U. S. Attorney General 329. For similar reasons the present United States Treasury Regulations (Regulations 113, Section 143.30) provide that the currently applicable Federal Transportation Tax "will not apply to an amount paid in the United States for transportation of property in course of exportation to a foreign destination."

The foregoing indicates as forcibly as possible the need for a direct decision on the point here raised. For this reason it is believed that a substantial Federal question is presented.

3. The critical question in the view which Appellant takes of this case is the simple one whether or not Appellant was engaged in the process of importing and exporting. This was not touched upon in the majority decision below. The dissenting Judges, however, said:

> "A tax on gross receipts from carriage of goods is manifestly a tax on exportation. Transportation is not an incident, direct or indirect, of commerce or exportation. It *is* commerce and exportation."

noring the fact that rail transportation and han-
f imports and exports is a part of the process of
ng and exporting which the Supreme Court has many
aid is protected from taxation by the Import-Ex-
l Export Clauses (*Fairbank* v. *United States*, 181
83 (1901); *United States* v. *Hvoslef*, 237 U. S. 1
Thames & Mersey Marine Insurance Co. v. *United*
237 U. S. 19 (1915); *Spalding & Brothers* v. *Ed-*
262 U. S. 66 (1923); *Willcuts* v. *Bunn*, 282 U. S. 216,
37); *Richfield Oil Corp.* v. *State Board of Equaliza-*
) U. S. 69 (1946)), the Court of Appeals of Maryland
a decision which is contrary also to the expressions
Supreme Court on ~~what~~ constitutes the process of
ng and exporting.

in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652
imported hemp was held still to be an import in
Ohio, after the conclusion of its rail journey from
of New York.

hames & Mersey Marine Insurance Co. v. *United*
supra, Mr. Justice Hughes said, "the rise in rates
rance as immediately affects exporting as an increase
ht rates."

irbank v. *United States, supra*, it was held that the
e of a bill of lading by a railroad company in Min-
was part of the exporting process.

recently in *Joy Oil Co.* v. *State Tax Commission*,
S. 286, 288 (1949), the Court said that "by the rail
it to Detroit one step in the process of exportation
n taken."

oseph v. *Carter & Weekes Stevedoring Co., supra*,
h the majority did not find it necessary to deal with
port-Export Clause, Justices Douglas and Rutledge
that loading and unloading by stevedores of
d goods was obviously a part of the "exporting

process". If handling by stevedores of goods on their foreign journeys is part of the exporting process, obviously handling by railroad is in no different category.

See also *T. & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111 (1913), and *Railroad Commission of La.* v. *Texas & Pacific Railway Co.*, 229 U. S. 336 (1913), holding that in the determination of whether foreign freight rates applied, it must be concluded that a railroad hauling freight destined to or from foreign ports is engaged in foreign commerce.

If a decision by the Court of Appeals of Maryland which is at variance with such a considerable body of law as developed by the Supreme Court is not reviewed, Appellant is denied important and substantial rights which appear to it to be established by the decisions of the Supreme Court of the United States. In addition, the law with respect to the scope of the Import-Export Clause fails to receive needed further clarification.

4. Appellant's reasons for believing that the Federal question in this case is substantial, may be summarized as follows:

(a) Because it is the only question in the case and the one on which Appellant bases its right to recover more than $75,000.00 in State taxes;

(b) Because the decision of the highest Court of Maryland is directly contrary to applicable decisions of the Supreme Court, including the most recent and most plainly governing decisions;

(c) Because the ultimate decision may be of more than local significance, and the existing law is not sufficiently definite as indicated by the refusal of the administrative authorities in Maryland to accept the present decisions of the Supreme Court as conclusive;

(d) Because the highest Court of Maryland ignored Appellant's contention that in transporting and handling goods in foreign commerce it is engaged in the importing and exporting process, and the Court thereby

reached a conclusion at variance with a number of expressions of the Supreme Court on what constitutes this process, which decision, in the interest of clarity and definiteness of the law, should be reviewed.

THEREFORE, Appellant, Western Maryland Railway Company submits that the Supreme Court of the United States has and should assume jurisdiction of this appeal under United States Code, Title 28, Section 1257(2).

Respectfully submitted,

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Baltimore, Maryland, July 10, 1950.

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